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In the Supreme Court of the United States

No. 321

OCTOBER TERM, 1958.

ADOLFE CARTELLONE, a.k.a JOSEPH PRINCE,
Petitioner,

vs.

JOHN M. LEHMANN,
District Director,
Immigration & Naturalization Service,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals
For the Sixth Circuit.

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PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals For the Sixth Circuit.

The petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit affirming the order of the United States District Court for the Northern District of Ohio, which had denied this petitioner's petition for review, and for an order reversing the order of deportation theretofore entered in this case.

OPINIONS BELOW.

The opinion of the Court of Appeals, set forth in the Appendix, *infra*, p. 22, is reported at 255 F. 2d 101. The memorandum opinion of the District Court appears in 148 F. Supp. 676.

JURISDICTION.

The judgment of the Court of Appeals was entered on April 29th, 1958 (App., *infra*, p. 23). A timely petition for rehearing was denied on June 3rd, 1958. The jurisdiction of this Court is invoked under 8 U. S. C. 1251(a)(1).

STATUTES INVOLVED.

Administrative Law and Procedure Act, 5 U. S. C. A., Section 1001, *et seq.*; Section 1251(a)(1), Title 8 U. S. C.:

"(a) Any alien in the United States (including an alien crewman) shall, upon the order of the Attorney General, be deported who—

"(1) at the time of entry was within one or more of the classes of aliens excludable by the law existing at the time of such entry;"

QUESTIONS PRESENTED.

1. Whether a defendant's statement against interest, which statement is the *sole evidence* in the case and which is later withdrawn by him because of mistake and at a reopened hearing such corrected statement is given and is corroborated by his wife, does that warrant the special inquiry officer to disregard the corrected statement and corroborative evidence and order deportation merely on the first, unsupported statement which is claimed to have been made through mistake? And is such unsupported statement that was claimed to have been made by mistake the kind of evidence that the law requires to support a deportation warrant, namely *reliable*, *probative* and *substantial* evidence?

Our answer is that the accepted evidence is not sufficient upon which to base a deportation warrant because

it cannot withstand the test now required—*reliable, probative* and *substantial* evidence.

2. Whether it is proper to base a deportation warrant on a "lodged" charge which was orally placed into the record during the hearing, that "lodged" charge being the sole ground of the deportation warrant, in view of the fact that none of the charges in the warrant of arrest were substantiated and all were dismissed. And was it error on the part of the special inquiry officer to deny a motion to dismiss the alien and discharge him from custody because of the failure by the department to substantiate any charge in the warrant of arrest?

Our answer is that it was error.

STATEMENT OF FACTS.

The petitioner is 58 years old and has resided in the United States for over 55 years. He was brought from Italy by his grandmother when he was less than 3 years old. His father died in Italy and when his grandmother brought him here he went to live with his mother, who had remarried and who died shortly thereafter. He was then raised in an orphanage in Cleveland until as a youth he made his own way in life. He is married to a native-born citizen of the United States and they now live together in Cleveland. They have a daughter about 24 years old, who is now married and living in Cleveland, Ohio.

In 1921 this petitioner was convicted of the crime of robbery, and was sentenced to serve 20 years in prison. He served 8 years of that sentence and was paroled for the balance of 12 years. Since that time he has not been convicted of any crime.

In 1941 a warrant of arrest for deportation was issued against this petitioner by the local Immigration Office and hearings were had. Towards the end of 1942 and the beginning of 1943 a warrant of deportation was issued against him, ordering his deportation to Italy. Due to the war during those years, the deportation was not effected, and when the war ended in 1945 he was then arrested for deportation, at which time a writ of habeas corpus was filed by present counsel.

Several conferences were held between this counsel and the United States District Attorney before Judge Emerich B. Freed of this Court, now deceased, and at the suggestion of the Court the Immigration Department agreed to withdraw the warrant of deportation and to grant a new hearing. This was done. The warrant of deportation, as well as the writ of habeas corpus, were withdrawn and a new hearing was ordered. This order was in 1945 but the new hearing was not scheduled by the Department until 1947. Due to the war, all deportation matters were postponed indefinitely.

At this reopened hearing this petitioner took the witness stand and testified that he was mistaken in his earlier testimony at the beginning of this case with regard to his statement that he, this petitioner, together with his wife, visited Crystal Beach in Canada for an hour or two either in 1934 or 1935. That shortly after the completion of that hearing in early 1943 he visited his wife in Florida and told her about his testimony to that effect, at which time she informed him that they did not go to Canada and that he was mistaken in his belief that they did and in his testimony to that effect. This petitioner then notified his attorney of record at that time as to what he now discovered, but was advised by his attorney that it was too late because the deportation warrant was already issued.

When he obtained his present counsel in 1945 this petitioner informed him of his discovery that he had made a mistake in his earlier testimony, and at the reopened hearing in 1947, as mentioned above, he stated that he was mistaken in his earlier testimony, and was corroborated by his wife, who also took the witness stand.

In her testimony Mrs. Prince stated that they took this trip to Niagara Falls, New York, because they wanted to see the Falls. That a couple named Galato, who were friends of her husband, went with them for part of the way; that during that trip Mr. Galato and her husband, together with Mrs. Galato, stopped in for some drinks and were gone quite a while, leaving her in the automobile. That she didn't like their being gone very well and for that reason when Prince and the Galatos returned to the car they did not go to Crystal Beach but instead were directed to an island known as Goat Island, which is United States territory, and from there they observed the Falls. On examination by the presiding inspector she testified that they all had a big dinner and that they were all drinking wine, and although she did not believe her husband was intoxicated she said that he frequently gets mixed up in directions, and what have you. Again she testified that while she didn't think her husband was intoxicated, she said, "I mean that I really and truly don't believe that my husband knew whether he was or wasn't." (No doubt she was referring to Canada.) She further testified that she was never in Canada in her life although she was born and raised in the United States, and was only in Buffalo, New York, once or twice.

Due to the second World War this case was held up and delayed from 1941 to 1945, when present counsel filed a petition for a writ of habeas corpus. As stated above, this writ came before Honorable Emerich B. Freed, now

deceased, and after conferences both in the Court and in chambers, it was suggested by him that the case be reopened for additional evidence. This was communicated to Washington and the Board agreed to reopen this case, and this was finally done in 1947 when both the petitioner and his wife testified to the new evidence. Then, the case did not reach the Board of Immigration Appeals in Washington until 1951, when on motion of the Commissioner of Immigration the Board withdrew the order of deportation ostensibly to give an opportunity to either this petitioner or the Department to submit additional evidence because, as the Commissioner stated, inasmuch as the Government had no evidence to contradict the petitioner's denial it was his opinion that no ruling be had on the order of deportation. The Board followed the suggestion of the Commissioner and ordered the order withdrawn. The case remained in status quo for an additional four and a half years, when at the request of this petitioner the Board ruled that the case be reopened; this was June, 1955. At that time petitioner and his counsel met with the new special inquiry officer, Mr. Fein, and inasmuch as neither side had any evidence to introduce upon the deportability of the alien, there was no hearing had with the exception that this special inquiry officer said he would read the record and give his decision. Seven months later, on January 23rd, 1956, he rendered an opinion ordering deportation and included the two new sections under the law of 1952. As we stated above, this we objected to, and took exception to the action of this special inquiry officer who made this finding without hearing any evidence at all.

ARGUMENT AND LAW.

1. Whether a defendant's statement against interest, which statement is the *sole evidence* in the case and which is later withdrawn by him because of mistake and at a reopened hearing such corrected statement is given and is corroborated by his wife, does that warrant the special inquiry officer to disregard the corrected statement and corroborative evidence and order deportation merely on the first, unsupported statement which is claimed to have been made through mistake? And is such unsupported statement that was claimed to have been made by mistake the kind of evidence that the law requires to support a deportation warrant, namely *reliable, probative* and *substantial* evidence?

Our answer is that the accepted evidence is not sufficient upon which to base a deportation warrant because it cannot withstand the test now required—*reliable, probative* and *substantial* evidence.

It is agreed by all concerned that the petitioner is not deportable from the United States unless it is established and concluded that he made a departure from the United States to Canada in 1934 or 1935, and that he subsequently returned and reentered the United States after such a visit.

All the evidence on that score is the petitioner's statement at a hearing in 1942 that he and his wife visited Crystal Beach in Canada for an hour or two, either in 1934 or 1935.

This statement was withdrawn at a reopened hearing when this petitioner testified that he made a mistake when he first testified that he went to Canada, because sometime after such testimony he discussed this with his wife, who was then living in Miami, Florida, and she advised him

that she was never in Canada in her life, and to her knowledge, since their marriage, that neither was he ever in Canada, especially during the Buffalo trip when they were with the Galatos, and that they saw the Falls from Goat Island, United States territory. She further advised him that while they did start out to go to Crystal Beach to swim she changed her mind after the trip began and while they were still in Buffalo because, as she testified on the witness stand, this petitioner, her husband, together with the Galatos, their companions on the trip, drank too much wine that afternoon and because of that the trip to Crystal Beach was cancelled.

At the next reopened hearing he so testified and stated that he wanted to withdraw the former testimony because of this mistake. His wife testified in corroboration. Many briefs, and at least four opinions, were filed thereafter, and several opinions were filed before the reopened hearing.

In the earlier opinions it was held by the administrative authorities that it was at least "some" evidence and therefore sufficient for deportation purposes. Later on, when deportation proceedings had to comply with the Administrative Procedure Act and "some" evidence was no longer sufficient, and the law required that there must be "substantial evidence" upon which to base a deportation warrant, the Commissioner of Immigration then filed a motion to withdraw the warrant of deportation, because, in his opinion it was not sufficient to maintain the deportation proceedings without additional evidence to be furnished either by the Department or by the alien. The warrant was thereupon withdrawn but nothing else was done about the case. Two years later undersigned counsel filed a motion to terminate the case. This motion was filed in 1953. The Board then ordered a reopened hearing and such hearing was held in June, 1955. Seven months later

the new special inquiry officer, without hearing any evidence at all, found this alien deportable under the new McCarran Act (Law of 1952), under certain sections of that statute which were comparable to sections of the old laws of 1917 and 1924. He stated that he read the old transcript and made his Findings. We took exception and appealed first to the Board of Immigration Appeals, then to the District Court for the Northern District of Ohio, and then to the Appellate Court. The District Court affirmed the Board of Immigration Appeals and the Appellate Court affirmed the District Court and this appeal is from the order of the Court of Appeals for the Sixth Circuit.

The fact is that the Government has no evidence at all and the entire case is made on the testimony of this appellant when he stated that he visited Canada for a short time either in 1934 or 1935. It might be possible to base a deportation order on that testimony if it would remain just that way. But when on a reopened hearing this witness claimed that he was in error when he so testified, and that the fact is that he was not in Canada, and that testimony is corroborated by his wife from the witness stand, then a different situation confronts us.

The exception in deportation cases which permits the basing of a deportation order on the alien's sole testimony is in itself so different from all other laws that it causes one to stop and think and attempt to reason why that legal procedure is permitted. But when one finds that after such testimony this sole witness recanted on the grounds of mistake and was corroborated in the withdrawal of this original testimony by his wife, both of whom testified on oath, then we state that there is nothing left in the record upon which to base a deportation order. To do otherwise is contrary to the principles under which our Courts have been operating. One may not like to be

found in a situation of this kind, but one must realize that they do happen, although infrequently.

In this case the alien testified that a short time after his original testimony he met with his wife, who was living in Miami, Florida, at the time the case began, and in a conversation with her she informed him that she had never been to Canada and to the best of her knowledge neither had he, at any rate not at the time in question. At the reopened hearing this petitioner stated that after his talk with his wife he went to the lawyers who handled his case in 1941 and 1943 and informed them of this situation, but they told him it was then too late to attempt to set aside the deportation order.

Deportation matters were suspended during World War II and in 1945 when this petitioner was ordered to appear for deportation he then went to his attorney, Gerard Pilliod, who in conjunction with present counsel began to test the deportation warrant by filing a writ of habeas corpus. After conference between counsel for petitioner, the District Attorney and the late Judge Emerich B. Freed, and upon the Judge's suggestion, the Board of Appeals ordered a rehearing, which took place in 1947. **It should be noted that this was the very first opportunity that this petitioner and his wife had to testify at this reopened hearing.**

It is our contention that the administrative determinations based upon the proceedings in this record were manifestly unfair; that substantial evidence to support the administrative findings is lacking, there being no documents or other evidence, and that the order reflects manifest abuse of discretion. In that manner, this petitioner was prevented from having a fair trial, which is his constitutional right.

District Judge Weick in the instant case held that this petitioner's first statement regarding the trip to Canada was a statement against interest and that therefore it should be considered as the best evidence in the case. We do agree that a statement against one's own interest is good evidence provided such statement was not made by mistake and provided that statement was not withdrawn and testimony bearing on such mistake was given together with corroborative evidence supporting the second statement. In such event the statement against one's own interest, if that is all the principal evidence in the case, does not become the best evidence when the withdrawal of that statement on the grounds of mistake is corroborated by another witness.

To the same effect see the case of *Gonzales vs. Landon*, 215 F. 2d 955. In this *Gonzales* case the District Court, as well as the Appellate Court, found that the statement against interest first made by Gonzales should be considered as the best evidence in the case, and so held. But the Supreme Court in 350 U. S. 920, 76 S. Ct. 210, reversed the holding of both courts on the ground that the standard of proof required in a case of that nature had not been satisfied. In the opinion the Supreme Court cited *Schneiderman vs. U. S.*, 320 U. S. 118, 63 S. Ct. 1333; *Baumgardner vs. U. S.*, 322 U. S. 665, 64 S. Ct. 1240.

While the above-mentioned cases are expatriation cases arising under Section 401(j) of the Nationality Act of 1940, it has been held that the same rule and the same standard of proof which is required in denaturalization cases is also applicable to the Immigration and Nationality Act of 1952.

The case of *Frausto vs. Brownell*, 140 F. Supp. 660, explains the Supreme Court's reversal of the *Gonzales* case. The principal facts in the *Frausto* case are quite

similar to the facts in the *Gonzales* case and on page 667 the Court says:

> "However, statements made before a board of special inquiry" (in the Prince case before the special hearing examiner), "are not conclusive, and it is up to this Court to determine whether it will accept the statements made by petitioner before this Court, and at other times, or the solitary admission made before the board of special inquiry conducted as hereinabove described. * * *"

And on page 668 the Court says:

> "The same rule should apply to the Immigration and Nationality Act of 1952."

The rule that the *Frausto* case speaks of is what the Supreme Court said in the *Gonzales* case, which is as follows:

> "December 12, 1955, per curiam.
>
> "The Court is of the view that the standard of proof required in denaturalization cases, see Schneiderman vs. United States, 320 U. S. 118, S. Ct. 1333; Baumgardner vs. United States, 322 U. S. 665, 64 S. Ct. 1240, is applicable to expatriation cases arising under Section 401(j) of the Nationality Act of 1940, 54 Stats. 1137, as amended (Immigration and Nationality Act of 1952, 8 U. S. C. A., Section 1481(a)), and has not been satisfied in this case. Accordingly, the judgment below is reversed without reaching the Constitutional questions that have been presented."

We desire to call to the attention of this Honorable Court that the actions of Special Inquiry Officer Fein and the Board of Immigration Appeals were arbitrary and capricious and an abuse of their discretion, and in that manner prevented this petitoner from having a fair hearing. We have reference now to the finding of Special In-

quiry, Officer Fein on January 23rd, 1956, wherein he made a finding of deportability on the grounds of violation of the Act of February 5th, 1917, and Section 241(a)(1) of the Immigration and Nationality Act of 1952 (a person who has been convicted of a felony involving moral turpitude prior to entry, or who admits having committed such a felony).

Furthermore, we say this act on his part was arbitrary and capricious **because no evidence at all was taken affecting deportability of this petitioner in the deportation case**, and evidently, this hearing examiner read the old record, which was started in 1941 and which was dormant from April 24th, 1951, at which time the Commissioner of Immigration, himself, filed a motion asking for the withdrawal of the warrant of deportation on the grounds mentioned in his motion, which, in part, are as follows:

"His testimony relating to his visit to Goat Island was corroborated by the testimony of his wife. While the question of the reentry of the respondent was considered in the order of this service on October 7th, 1947, it should be noted that the decision was based entirely on testimony given by respondent and his wife. There was no documentary evidence to establish a visit to Canada and a subsequent reentry to the United States.

"Inasmuch as the respondent still contends that he never left the United States after his original entry in 1903 it would appear advisable to re-examine the entire question as to whether or not respondent visited Canada in 1934 or 1935, particularly in view of the fact that the respondent may have additional evidence to submit concerning his alleged contention regarding an absence of a reentry into the United States.

"In view thereof the order of deportation should be withdrawn and the proceedings be reopened for

further hearings. This service does not desire to be represented before the Board in the matter."

The Court will note that the Commissioner of Immigration stated in this motion before the Board of Immigration Appeals that he requested the withdrawal of the warrant of deportation, giving as his reason the fact that all the evidence in the case is from the alien himself, and the alien then claimed that he made a mistake and withdrew the evidence he first gave, stating that he did not go to Crystal Beach in Canada, which later statement was corroborated by his wife. The Commissioner further stated in view of the fact that the *Government has no evidence of its own to contradict that evidence* and no documentary evidence, it was his opinion that the alien is *not deportable unless it be concluded that he left the United States and reentered*, and he felt that the warrant of deportation should be withdrawn and that it should be held over until further evidence was obtained, *either by the Government or by the alien*, which could be introduced at a later date. This motion was granted by the Board on May 22, 1951, and the case was dormant until 1956, when Special Inquiry Officer Fein made his latest ruling. No evidence bearing on deportation was taken, the alien stated that he had no more evidence to introduce, and the Government did not introduce any evidence except a map. That was the total hearing which took place and which later resulted in the finding by Special Inquiry Officer Fein ordering this petitioner's deportation on the grounds mentioned above.

The warrant of deportation that was ordered withdrawn named the Act of February 5th, 1917, as the ground for deportation. It did not mention Section 241 (a) (1) because there was no such law in effect. The effective date

of this law was not until December 24th, 1952. No evidence was introduced before this special examiner affecting 241(a)(1), or affecting any law, before he made his finding. It appears that he probably read the old record and decided that the Act of February 5th, 1917, and Section 241(a)(1) of the new law were comparable offenses and made findings accordingly, without taking any evidence at all.

We do not believe he has that right; we believe he exceeded his authority, and we believe his actions were arbitrary and capricious and should be set aside and reversed by this Court.

We further believe that the District Judge is in error where he holds that the Court may not inquire into the weight of the evidence, that the Court has no right to pass upon the credibility of witnesses, and that the Court has no right to pass upon the facts of the case. The Court's holding in this case was true at one time, in deportation cases particularly, but is no longer the law since the passage of the Administrative Procedure Act. That Act gave the District Court the right for a full and complete review of the case as a whole, and that, of course, would give the District Court the right to decide whether any and every question decided by an administrative agency was or was not correct. This would include whether the agency properly weighed the evidence, whether there was or was not substantial evidence, whether there was probative evidence, whether the evidence was or was not sufficient in quality or quantity upon which to predicate a warrant of deportation. In short, it meant a complete judicial review of everything involved in the case, and the Court has the right to pass upon and to decide what may remain or what may not remain in the case; that includes questions of fact, as well as questions of law.

We believe the District Judge was in error in his finding in that his holding as to his powers is contrary to the opinion of the Sixth Circuit Court of Appeals in the case of *Pittsburgh S. S. Co vs. National Labor Relations Board*, 180 F. 2d 731. On page 733 the Court says:

> "The Board concedes that the review in this Court is controlled by the two statutes, but contends that the scope of judicial review as to findings of fact has in no way been affected by them. **We think this contention is erroneous.**" (Emphasis supplied.)

The Court continues on page 734:

> "The conclusion that the Administrative Procedure Act and the Taft-Hartley Act were intended to effect a change in procedure before the Board and to create more effective judicial review is inescapable in light of the legislative history."

2. Whether it is proper to base a deportation warrant on a "lodged" charge which was orally placed into the record during the hearing, that "lodged" charge being the sole ground of the deportation warrant, in view of the fact that none of the charges in the warrant of arrest were substantiated and all were dismissed. And was it error on the part of the special inquiry officer to deny a motion to dismiss the alien and discharge him from custody because of the failure by the department to substantiate any charge in the warrant of arrest?

Our answer is that it was error.

The warrant of arrest which resulted in the warrant for deportation did not contain any charge that this petitioner left the United States in 1934 or 1935 and returned illegally. Actually, all the charges in the warrant were not substantiated and were dismissed by the Government. The charge that resulted in the deportation order was an oral

charge, and that came about during the hearing in 1941 when the answer to a question by the special inquiry officer resulted in the oral lodging by him of this charge, namely, that this petitioner left the United States and went to Canada for an hour and a half and returned, and that such return was illegal.

Then in 1956, about fifteen years later, another special inquiry officer, although no valid warrant of arrest for deportation was in existence any longer, called a hearing for the purpose of taking testimony, but at which hearing, although attended by the petitioner and this special inquiry officer, no testimony was taken affecting the deportability of this petitioner. However, this special inquiry officer (Fein) made another oral charge to the effect that the petitioner should be deported under Section 241(a)(1) of the new law, the Immigration and Nationality Act of 1952. Previously, the finding of the first special inquiry officer was that this petitioner was deportable under the law of February 5th, 1917. Of course, in 1956 the law of 1917 had been repealed by the Immigration and Nationality Law of 1952, and yet without any evidence taken before this Special Inquiry Officer Fein, he made such finding, as he stated, from the mere reading of the record. We objected at the time to such finding on the ground that there was no evidence before this special inquiry officer of any kind upon which to make any finding.

It is contended herein that the failure by the Department to sustain any charge in the warrant terminated the case and that it should have been dismissed, and it is further contended that if any further and different charges were contemplated against this petitioner, these charges should have been made by a warrant as was originally done in this case. That the special inquiry officer should not have proceeded as he did by holding this

petitioner in the case without any warrant giving him the right to do so.

Section 4, Rules of Deportation Proceedings, holds as follows:

> "WARRANT OF ARREST. If the investigating officer determines that a prima facie case for deportation of an alien exists he applies for a warrant of arrest to a district director or certain other officers of the Service authorized to issue a warrant of arrest.
>
> "A copy of the warrant of arrest is served on the alien and he is advised of the cause of his arrest. In case the alien is mentally incompetent and in the case of children under sixteen years of age an additional copy of the warrant of arrest is served on the alien's guardian, relative or friend whenever possible."

And Section 5, Rules of Deportation Proceedings, states:

> "HEARING BEFORE SPECIAL INQUIRY OFFICER. When served with the warrant of arrest the alien is advised of his right to be represented by counsel, at no expense to the Government. The alien is given a reasonable period of time after the service of the warrant of arrest within which to arrange for the presentation of his case including representation by counsel. The alien, now referred to as the 'respondent,' is given notice of the nature of the charges against him and the time and place at which the proceedings will be held. * * *
>
> "The special inquiry officer is directed by regulations to conduct a fair and impartial hearing. No decision of deportability is valid unless based on reasonable, substantial and probative evidence. The special inquiry officer is required to exclude from the record any evidence that is irrelevant, immaterial, or unduly repetitious."

Also, Section 242.14 of the Immigration and Nationality Act of 1952 states:

> "*Execution of warrants of arrest*—(a) Service. Except as provided in Section 242.34, an alien against whom a warrant of arrest has been issued shall be taken into custody under the authority of the warrant of arrest, or if previously taken into custody without a warrant of arrest under the authority contained in section 287 of the Immigration and Nationality Act, shall be continued in custody under the warrant of arrest subsequently issued unless his release is authorized. In either case a copy of the warrant of arrest shall be served upon the alien, and he shall then be fully advised of the cause of his arrest. * * *"

We further claim that the failure to charge properly in a second warrant, after the charges of the first warrant could not be sustained, made the proceedings that followed and the two lodged charges void, and neither one of them should have been sustained as a basis for deportation against this petitioner.

It is our contention that it is error to permit the special hearing officer to file oral or so-called "lodged" charges after the original warrant charges have not been sustained because it violates the requirement in law that any charge against any person in any Court or before any administrative body must be in writing. That a "charge" is a first step in a prosecution, being an accusation in legal form either for the apprehension or the trial of an offender before the proper tribunal.

It therefore follows that the acts of the special inquiry officer in placing an oral, lodged charge, which lodged charge later resulted in a deportation warrant, was error. We say this because none of the charges in the warrant were sustained and his failure then to issue a new war-

rant of arrest for any new discovery that the Department claims to have made, and to proceed without a new warrant of arrest, was an act of arbitrariness and capriciousness and was therefore illegal and in violation of this petitioner's constitutional rights.

While it may be proper under certain conditions to place a charge orally during the course of a hearing and make a finding thereon based upon other charges in the warrant, including the oral charge, it does not appear to the undersigned that it is proper in a case like ours where all of the charges in the warrant of arrest were dismissed and the only charge remaining is the oral charge and that, itself, is the entire controversy of the case. It seems to the undersigned counsel that a deportation order founded on a controversial base such as in this case ought not to be placed against a person who is a fifty-six-year resident of the United States, especially when the Government had no evidence of its own to support any portion of this oral, or "lodged" charge upon which this warrant of deportation is based.

The petitioner is rather a product of our land as he was only two years old when he came here. True, he transgressed, but he paid the price to society. His native-born wife and daughter are now entitled to the company of their husband and father as well as of other people, and it does not seem fair to banish a man of his type on evidence that is so controversial that the United States Commissioner of Immigration saw fit to ask for a withdrawal of the warrant during a portion of the case, and the Board saw fit to grant it and delayed the matter for about five years.

All in all, the kind of evidence upon which this order of deportation is based is the kind of evidence that would indicate that this petitioner did not receive a fair hearing

and that his testimony and the testimony of his wife was completely overlooked by the last special hearing examiner, as well as by the District and Appellate Courts.

Furthermore, when Hearing Officer Fein in 1956, without hearing any evidence, entered a ruling of deportation against this petitioner, such ruling was not in accordance with due process of law and was unconstitutional and therefore illegal, and this petitioner should be ordered discharged from custody.

CONCLUSION.

This petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX.

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

(Filed April 29, 1958.)

Before MARTIN, MILLER and STEWART, *Circuit Judges.*

MARTIN, Circuit Judge. This is an appeal from an order of the United States District Court dismissing the petition of appellant to restrain execution of an order of deportation issued by the Attorney General under the provisions of the Immigration Laws of the United States. This United States Court of Appeals formerly reversed the dismissal by the United States District Court of an action to review the deportation order and held that, under the provisions of the Administrative Procedure Act, the order of deportation was subject to judicial review. *Prince v. Commissioner of Immigration and Naturalization,* 185 F. (2d) 578 (C. A. 6; 1950).

A motion was filed in the Board of Immigration Appeals by the Assistant Commissioner to withdraw the order of deportation and reopen the proceedings. A hearing was had before a Special Inquiry Officer, who held that appellant had illegally reentered the United States from Canada in 1934 following an afternoon's visit at Crystal Beach, Ontario, Canada; and Cartellone was therefore ordered to be deported.

Complying with the authorization of the Administrative Procedure Act for review by the district court, an inquiry as to the fairness of the hearing before the Special Inquiry Officer and as to whether the order of the administrative agency was supported by reasonable, substantial and probative evidence was had in the United States District Court. United States District Judge Weick gave careful consideration to the issues involved and, in a well

reasoned opinion [148 F. Supp. 676 (N. D. Ohio, 1957)], held that the order of deportation was supported by substantial evidence. He, accordingly, dismissed the petition of appellant. Judge Weick stated: "If the result seems harsh, in view of petitioner's long stay here, he has no one to blame but himself, for his behavior has certainly not been what this country had the right to expect of an alien living here at its sufferance."

Inasmuch as the district judge has written a careful and correct opinion, we find no occasion for a re-write of his views, in which we concur as to all consequential matters. The decision of the district court is, therefore, affirmed.

JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

(Filed April 29, 1958.)

Appeal from the United States District Court for the Northern District of Ohio.

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Ohio, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed.

ORDER DENYING PETITION FOR REHEARING.

(Filed June 3, 1958.)

The petition for rehearing is denied.

Office-Supreme Court, U.S.
FILED
SEP 25 1958
JAMES R. BROWNING, Clerk

No. 321

In the Supreme Court of the United States

OCTOBER TERM, 1958

ADOLFE CARTELLONE, ALSO KNOWN AS JOSEPH PRINCE,
PETITIONER

v.

JOHN M. LEHMANN, DISTRICT DIRECTOR, IMMIGRATION AND NATURALIZATION SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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OPINIONS BELOW

The opinion of the Court of Appeals (R. 39–40; Pet. App. 22–23) is reported at 255 F. 2d 101. The memorandum opinion of the district court (R. 26) is reported at 148 Fed. Supp. 676.

JURISDICTION

The judgment of the Court of Appeals was entered on April 29, 1958 (R. 37; Pet. App. 23) and a petition for rehearing (R. 42–48) was denied on June 3, 1958 (R. 49; Pet. App. 23). The petition for a writ of certiorari was filed on August 28, 1958. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. Whether the order of deportation is supported by substantial probative evidence.

2. Whether it was proper to base the deportation order on charges lodged during deportation hearings.

STATUTES AND REGULATIONS INVOLVED

Section 242 (b) of the Immigration and Nationality Act of 1952 (8 U. S. C. 1252 (b)):

> A special inquiry officer shall conduct proceedings under this section to determine the deportability of any alien, and shall administer oaths, present and receive evidence, interrogate, examine, and cross-examine the alien or witnesses, and, as authorized by the Attorney General, shall make determinations, including orders of deportation. Determination of deportability in any case shall be made only upon a record made in a proceeding before a special inquiry officer, at which the alien shall have reasonable opportunity to be present, unless by reason of the alien's mental incompetency it is impracticable for him to be present, in which case the Attorney General shall prescribe necessary and proper safeguards for the rights and privileges of such alien.
>
> * * * * *
>
> Proceedings before a special inquiry officer acting under the provisions of this section shall be in accordance with such regulations, not inconsistent with this chapter, as the Attorney General shall prescribe. Such regulations shall include requirements that—
>
> (1) the alien shall be given notice, reasonable under all the circumstances, of the nature of

the charges against him and of the time and place at which the proceedings will be held;

(2) the alien shall have the privilege of being represented (at no expense to the Government) by such counsel, authorized to practice in such proceedings, as he shall choose;

(3) the alien shall have a reasonable opportunity to examine the evidence against him, to present evidence in his own behalf, and to cross-examine witnesses presented by the Government; and

(4) no decision of deportability shall be valid unless it is based upon reasonable, substantial, and probative evidence.

The procedure so prescribed shall be the sole and exclusive procedure for determining the deportability of an alien under this section. * * *

The pertinent regulations (8 C. F. R., January 1, 1958) provide as follows:

Section 242.14:

Evidence—(a) *Sufficiency.* A determination of deportability shall not be valid unless based on reasonable, substantial, and probative evidence.

* * * * * *

(c) *Use of prior statements.* The special inquiry officer may receive in evidence any oral or written statement which is material and relevant to any issue in the case previously made by the respondent, or any other person during any investigation, examination, hearing, or trial.

Section 242.16:

* * * * *

(d) *Additional charges.* An examining officer who has been assigned to a case may at any time

during a hearing lodge additional charges of deportability, including factual allegations against the respondent. The additional factual allegations and charges shall be submitted in writing and entered as an exhibit in the record. The special inquiry officer shall read the additional factual allegations and charges to the respondent and explain them to him in nontechnical language. The special inquiry officer shall advise the respondent if he is not represented by counsel that he may be so represented and also that he may have a reasonable time within which to meet the additional factual allegations and charges. The respondent shall be required to state then and there whether he desires a continuance for either of these reasons.

STATEMENT

In October 1941 a warrant of arrest was issued by the immigration authorities charging petitioner with prostitution activities in violation of the Immigraton Act of 1917. At a hearing held in February 1942, petitioner, a national of Italy, testified that after his entry into the United States in 1903 he traveled, in July or August of 1934 or 1935, to Crystal Beach, Canada, for a few hours to go to the bathing beach. He testified that he was questioned by customs authorities on his way to Crystal Beach, that he was asked to show the ownership of his car, and that he had no passport (I. F. 171–173).[1] He also said that he had been convicted of robbery and grand larceny in Niagara County, New York in 1922 (I. F. 11, 124). A

[1] The designation "I. F." refers to the immigration file, which is lodged with the Clerk of this Court.

hearing officer issued findings of facts and conclusions of law in which he found that petitioner was deportable for managing a house of prostitution and for having committed a felony prior to entering the United States in 1934 (I. F. 163–166). The hearing officer's findings were affirmed by the Board of Immigration Appeals (I. F. 124–130).

The case remained in status quo during the war until 1945. At that time petitioner's counsel filed an application to reopen the immigration hearing on the ground that additional evidence would be submitted both by petitioner and his wife, who did not testify at the original hearing, that petitioner did not run a house of prostitution (I. F. 116–123). The motion was granted (I. F. 114–115).

At the reopened hearing in March, 1947, both petitioner and his wife testified that petitioner did not go to Crystal Beach, Canada, in 1934 or 1935 as petitioner had originally testified. They said that instead they went to Goat Island in Niagara Falls, New York. Petitioner testified that after the first hearing he discussed the trip to Crystal Beach with his wife and she said she was positive that they did not go to Canada at that time (I. F. 323–329).[2] His wife said that they had visited friends (Mr. and Mrs. Theodore

[2] Petitioner testified that the next occasion on which he discussed this visit with anyone was a year and a half later, after receiving the "verdict" that he was subject to deportation. He testified that his then attorney told him that "It's too late now." He next discussed this matter, he testified, in 1945 or 1946 when he retained his present counsel (I. F. 325).

Calato) in Buffalo, New York, with whom they had dinner. Her husband drank wine, and although he was not intoxicated he was mixed up in his directions (I. F. 333–337, 344–346). Petitioner, his wife and the Calatos thereafter drove to Niagara Falls, New York (I. F. 334), no mention being made of Crystal Beach. The Calatos did not accompany petitioner and his wife to the waterfalls but got out of the car in the city of Niagara Falls after telling them how to reach a bridge leading to a little island from which they could see the falls (I. F. 334–335). Petitioner's wife testified no one spoke to them before they crossed the bridge (I. F. 335). They stayed at the island for 15 or 20 minutes and then returned to the city of Niagara Falls where they picked up the Calatos (I. F. 337, 346).

At a continuation of the hearing in July, 1947, the presiding officer lodged an additional charge against petitioner, that he had been convicted of robbery prior to entering the United States in 1934—*i. e.*, the Crystal Beach re-entry. There was admitted in evidence the record of petitioner's conviction in 1922. The hearing officer offered petitioner an opportunity to be heard on this charge and additional time if he wished to present additional evidence on this new charge. Petitioner did not desire to present any evidence or wish any more time (I. F. 347–352). The presiding immigration officer found as a result of the second hearing that under section 19 of the 1917 Act, petitioner was deportable as an undesirable alien

[*] Petitioner testified that he had lived in Buffalo in 1919 for about two or three months (I. F. 325).

because he had been convicted of a felony prior to his entrance into the United States, that is, prior to 1934, and that he admitted having committed such felony (I. F. 111–112). He felt that petitioner's "activities in connection with prostitution are not such that they may be used as a basis for deportation * * *" (I. F. 111) since they were not contemporaneous with his arrest by the immigration authorities (I. F. 107). On appeal the Board of Immigration Appeals affirmed the order.

In 1951, the order and warrant of deportation were withdrawn (I. F. 77, 78) on motion of the Immigration Service which noted that inasmuch as "the respondent still contends that he never left the United States after his original entry in 1903, it would appear advisable to re-examine the entire question as to whether or not respondent visited Canada in 1934 or 1935, particularly in view of the fact that respondent may have additional evidence to submit concerning his alleged contention regarding an absence of a re-entry into the United States" (I. F. 79). Accordingly, in June 1955, a new hearing before the Immigration and Naturalization Service was held.

At that hearing charges were lodged under the 1952 Act that petitioner was deportable as having been convicted of a felony in 1922, prior to re-entry into the United States in 1934 or 1935. When questioned as to whether he desired additional time to meet these charges he indicated that he was ready to proceed with the hearing (I. F. 47–53). Petitioner did not present additional evidence (I. F. 49, 62). His counsel stated that he "[did] not choose to present any addi-

tional evidence or to add anything to the previous evidence that has been given on behalf of the relator and witnesses and [chooses] to rest on that record * * *" (I. F. 49). Thus petitioner made no effort to corroborate his and his wife's testimony with respect to the visit to Goat Island. The government introduced in evidence a map showing Goat Island on the Niagara River, New York, and Crystal Beach on Lake Erie, Canada (I. F. 53, 63a).

The Special Inquiry Officer found petitioner deportable under 8 U. S. C. 1251 (a) (1) (the 1952 Act) and under section 19 of the 1917 Act (39 Stat. 889-890) in that he had been convicted of a felony—robbery, first degree—prior to his last re-entry into the United States, in 1934, from Canada. Adopting the findings of the 1947 hearing officer, he also found that petitioner was not deportable for any alleged prostitution activities since they were not contemporaneous with the immigration arrest (I. F. 40–46). After argument before the Board of Immigration Appeals, the appeal was dismissed (I. F. 10–15).

Petitioner filed an action for review in the United States District Court for the Northern District of Ohio. The district court sustained the order of deportation as being supported by substantial evidence, that is, the sworn testimony of petitioner at the original hearing (148 Fed. Supp. 676). The Court of Appeals affirmed (Pet. App. 22–23).

ARGUMENT

1. Petitioner contends (Pet. 7–16) that the government failed to prove by "reliable, probative and

substantial evidence" that he reentered the United States in 1934 after having been convicted of a felony in 1922. He relies on the fact that the evidence of the 1934 entry was his 1942 admission of his re-entry from Canada which he retracted for the first time in 1947 (I. F. 90). But such testimony, as an admission against interest, constitutes substantial evidence against petitioner, even though denied subsequently. See *Miles* v. *United States*, 103 U. S. 304, 308–309, 311; 4 Wigmore, *Evidence* (3rd ed.), Section 1048. That is particularly true under the circumstances presented by this record. Petitioner's admissions were definite, unequivocal, and were made at a time when he apparently was unaware of their significance (cf. I. F. 90). In his 1942 hearing he said that he was questioned at the bridge and that he was asked to show the title to his car. This is the normal procedure when crossing into Canada. In addition, petitioner said that he entered Canada to go to the bathing beach. Crystal Beach is an amusement park and a bathing beach on Lake Erie, about 35 miles from the Falls. On the other hand, Goat Island is merely a part of the park at Niagara Falls, New York, connected with the mainland by a small bridge, from where the Falls are viewed. There is no questioning when crossing the bridge, and the island itself contains no beaches suitable for bathing and is merely a point from which to view the falls (I. F. 19–20). Moreover, petitioner's delay in retracting his admission and the circumstances surrounding that retraction (see *supra*, p. 5) cast strong doubt on its credibility. For these reasons, as the district court held (148 Fed. Supp. 676,

681), the order of deportation "was supported by substantial evidence * * *".[4]

Petitioner argues, on the basis of *Gonzales* v. *Landon*, 350 U. S. 920, that his own admissions are an inadequate foundation for a deportation order. But *Gonzales* involved loss of nationality by a native born citizen, not deportation of an admitted alien. The standard of "clear, unequivocal and convincing evidence" applicable to loss of nationality does not apply to deportation, as to which the statute (Section 242 (b), *supra*) fixes the standard of "reasonable, substantial and probative evidence". Moreover, *Gonzales* involved subjective issues as to motivation, as to which conflicting statements were difficult to assess. Here, the prior admission concerned a simple fact to which petitioner testified in the kind of detail that imported verity. Deportation orders resting on voluntary admissions which bear the ring of truth have been sustained. *Schoeps* v. *Carmichael*, 177 F. 2d 391 (C. A. 9), certiorari denied, 339 U. S. 914; *Navarrette-Navarrette* v. *Landon*, 223 F. 2d 234, 237 (C. A. 9), certiorari denied, 351 U. S. 911.

Petitioner's argument that the evidence at the last hearing was insufficient because the hearing officer relied on the prior record (Pet. 14) is without merit. At the reopened hearing it was proper to rely on the 1947 record (8 C. F. R. 242.14 (c), *supra*, p. 3). The case was reopened for further hearing, particularly to

[4] Petitioner's assertion that the district court did not properly review the evidence (Pet. 16) is refuted by its opinion which shows that the court did review the administrative record and found the administrative conclusion adequately supported by substantial evidence.

permit *petitioner* to submit additional evidence regarding his alleged re-entry into Canada in 1934. Petitioner did not attempt to corroborate his revised version of the events. Indeed, at the last hearing, he objected to questions "on the ground that all of this testimony was covered in previous hearings and is now in the record." (I. F. 58; see also I. F. 61.)

2. Petitioner's contention that it was error to base his order of deportation on a charge lodged during the hearing is answered by the Immigration Regulations, 8 C. F. R. 242.16, *supra*, pp. 3–4, which were promulgated under 8 U. S. C. 1252 (b), *supra*, p. 2. The regulations specifically provide that charges may be lodged at deportation hearings. In accordance with these regulations, petitioner was given every opportunity to be heard on the additional charges lodged at the 1947 and 1955 hearings, and was offered additional time, which offer he declined, to be heard on those charges.

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be denied.

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SEPTEMBER 1958.